

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BEANS & ROCKS LLC,

CASE NO. 3:21-cv-05528-DGE

Plaintiff,

ORDER ON DEFENDANTS' MOTIONS TO DISMISS (DKT. NOS. 7, 21) AND PLAINTIFF'S CROSS MOTION AND REPLY (DKT. NO. 23)

PACIFIC COUNTY, et al.,

Defendants.

I. INTRODUCTION

This matter comes before the Court on the Motions to Dismiss of Defendant Karen Bannish (Dkt. No. 7) and Pacific County (Dkt. No. 21) as well as Plaintiff's Cross Motion and Response (Dkt. No. 23) and Plaintiff's Response to the Courts Order regarding futility of amendment. (Dkt. No. 27.) Having considered the pleadings filed in support of and in opposition to the motions and the remainder of the record, the Court hereby DISMISSES Plaintiff's Due Process and Equal Protection claims and DECLINES to exercise supplemental jurisdiction over Plaintiff's remaining state law claims for the reasons discussed herein.

II. BACKGROUND

A. Factual Background

Plaintiff operates a rock quarry business in Pacific County, WA (the “County”). (Dkt. No. 1 at 1.) The County undertook a road construction project referred to as the “Heckard Road Project” (the “Project”). (*Id.* at 2.) The County hired non-party Gill Construction to complete the Project. (*Id.* at 3.) Defendant Karen Bannish worked at the County as a Senior Engineering Technician and was involved with the hiring of contractors and suppliers for the Project. (*Id.* at 2.)

Having been previously approved by the Washington State Department of Transportation for various uses, including for the types of materials used in the upcoming Project, Plaintiff sought to have materials from its quarry tested in order to be considered as a supplier for the Project. (*Id.* at 2–3.)

Defendant Materials Testing & Consulting, Inc. (“MTC”) was hired by the County to test materials from Plaintiff’s quarry to see if the materials met specifications for the Project. (*Id.* at 2.) As Plaintiff alleges, on the date of the testing of the materials, MTC came by a job site that Plaintiff’s materials were being used at and took a sample from a graded roadway. (*Id.* at 3.) As Plaintiff alleges, the material in the graded roadway had already been compacted and differed in a number of ways from the materials at Plaintiff’s quarry. (*Id.*) Days later, MTC told Plaintiff that the sampled materials failed one of the tests and as a result, Plaintiff was informed that it could not be the supplier of materials for the Project. (*Id.* at 3–4.) Plaintiff has brought this action against the County, MTC, and Defendant Karen Bannish seeking damages.

B. Procedural Background

1 Plaintiff filed its Complaint on July 20, 2021. (Dkt. No. 1.) On November 1, 2021,
2 Defendant Karen Bannish moved to dismiss. (Dkt. No. 7.) Plaintiff did not file a response. On
3 January 25, 2022, Defendant Pacific County moved to dismiss for failure to state a claim. (Dkt.
4 No. 21.) In response to Defendant Pacific County’s motion, Plaintiff filed its “Cross Motion and
5 Response” which the Court construed as a motion for leave to amend. (Dkt. No. 23.) Plaintiff
6 attached its Proposed Amended Complaint to the motion. (Dkt. No. 23-1.) After Defendants
7 Pacific County and Karen Bannish filed their Reply to Plaintiff’s Motion, (Dkt. No. 24) the
8 Court issued a Minute Order asking Plaintiff to explain why its proposed amendments would not
9 be futile. (Dkt. No. 25.) Plaintiff responded on March 18, 2022 (Dkt. No. 27) (the “Response”),
10 to which Defendant Pacific County filed its response. (Dkt. No. 29.)

11 III. DISCUSSION

12 A. Standard of Review

13 A complaint must contain a “short and plain statement of the claim showing that the
14 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Rule 12(b)(6)
15 of the Federal Rules of Civil Procedure can be granted only if the complaint, with all factual
16 allegations accepted as true, fails to “raise a right to relief above the speculative level.” *Bell Atl.*
17 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere conclusory statements in a complaint and
18 “formulaic recitation[s] of the elements of a cause of action” are not sufficient. *Id.* “Dismissal
19 can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
20 under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
21 1988) (citation omitted).

22 When ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the
23 Court accepts all facts alleged in the complaint as true and makes all inferences in the light most
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1 favorable to the non-moving party. *Baker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 824
 2 (9th Cir. 2009). However, the court is not required to accept as true a “legal conclusion couched
 3 as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint “must
 4 contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its
 5 face.” *Id.* at 678. This requirement is met when the plaintiff “pleads factual content that allows
 6 the court to draw the reasonable inference that the defendant is liable for the misconduct
 7 alleged.” *Id.* The complaint need not include detailed allegations, but it must have “more than
 8 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
 9 do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Absent facial plausibility, a
 10 plaintiff’s claims must be dismissed. *Id.* at 570.

11 Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that the court should
 12 freely give leave to amend “when justice so requires.” Five factors are typically considered
 13 when assessing the propriety of a motion for leave to amend: (1) bad faith; (2) undue delay; (3)
 14 prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has
 15 previously amended his complaint. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).
 16 Futility alone can justify the denial of a motion for leave to amend. *Id.* (citations omitted).

17 Leave to amend may be denied where a proposed amended pleading “either lacks merit
 18 or would not serve any purpose because to grant it would be futile in saving the plaintiff’s
 19 suit.” *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1144 (9th Cir. 2015) (quoted
 20 source omitted); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir.
 21 1998) (the general rule allowing amendment of pleadings “does not extend to cases in which any
 22 amendment would be an exercise in futility, . . . or where the amended complaint would also be
 23 subject to dismissal[.]”)

1 **A. Plaintiff Fails to Identify an Interest Protected by the Due Process Clause**

2 The Due Process Clause of the Fourteenth Amendment states, “[Nor] shall any State
 3 deprive any person of life, liberty, or property without due process of law.” *Sagana v. Tenorio*,
 4 384 F.3d 731, 742 (9th Cir. 2004) (citing U.S. CONST. amend. XIV, § 1). To state a substantive
 5 or procedural due process claim, a recognized property or liberty interest at stake must be
 6 identified. *Guzman v. Shewry*, 552 F.3d 941, 953 (9th Cir. 2009). Property interests are not
 7 created by the Constitution itself, but rather are “defined by existing rules or understandings that
 8 stem from an independent source such as state law.” *Town of Castle Rock v. Gonzales*, 545 U.S.
 9 748, 756 (2005). “But the range of interests protected by procedural due process is not
 10 infinite.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–570 (1972).

11 Plaintiff argues that Defendants’ interference with its opportunity to supply the materials
 12 for the Project resulted in lost profits to Plaintiff. Specifically, Plaintiff’s Proposed Amended
 13 Complaint argues that Defendants have “deprived Plaintiff of a constitutionally-protected
 14 property interest, namely, the annual operating profits to which Plaintiff had a legitimate
 15 entitlement, as demonstrated by its lengthy and successful operating history.” (Dkt. No. 23–1 at
 16 10–12.) However, Plaintiff has not cited any authority recognizing a property interest in
 17 potential future profits. Indeed, the Ninth Circuit has found no property interest in future profits
 18 when the parties are actually in contract, let alone when the parties are not in contract. *San*
 19 *Bernardino Physicians’ Servs. Med. Grp., Inc. v. San Bernardino Cty.*, 825 F.2d 1404, 1410 (9th
 20 Cir. 1987) (holding that a government contractor did not have a property interest in performance
 21 on existing contracts with the government).

1 In its Response, Plaintiff alternatively states that Plaintiff has a liberty interest in pursuit
 2 of its business.¹ (Dkt. No. 27 at 1.) Specifically, Plaintiff appears to argue that it has a protected
 3 right to choose its occupation. (*Id.* at 1-2.) However, the law is clear that not being hired for a
 4 particular job, “but remain[ing] as free as before to seek another” is not a deprivation of a
 5 constitutionally protected liberty interest. *Roth*, 408 U.S. at 575. Even the cases Plaintiff cites in
 6 support of its position recognize that a complete prohibition on one’s ability to pursue an
 7 occupation is required to show a deprivation of a protected liberty interest. *Jones v. City of*
 8 *Modesto*, 408 F. Supp. 2d 935, 951 (E.D. Cal. 2005) (citing *Dittman v. California*, 191 F.3d
 9 1020, 1029 (9th Cir.1999)).

10 Plaintiff here has made no allegation that it no longer can operate as a rock quarry or
 11 apply for future contracts. Plaintiff does make the allegation that it has suffered reputational
 12 harm as a result of not being awarded the Project contract, however reputational injury is not a
 13 protected liberty. *Paul v. Davis*, 424 U.S. 693, 712 (1976) (“petitioners’ defamatory
 14 publications, however seriously they may have harmed respondent’s reputation, did not deprive
 15 him of any ‘liberty’ or ‘property’ interests protected by the Due Process Clause.”).

16 Thus, as Plaintiff has failed to allege a recognized property or liberty interest at stake,
 17 Plaintiff has failed to adequately allege due process claims. Therefore, the Court DISMISSES
 18 Plaintiff’s substantive and procedural due process claims for failure to state a claim.

19 **B. Plaintiff Fails to State a Claim for Violation of the Equal Protection Clause**

20 To state a 42 U.S.C. § 1983 claim “for a violation of the Equal Protection Clause of the
 21 Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose

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 23 ¹ Although the Court is required to only look at the pleadings, in an abundance of caution, the
 24 Court will address this argument.

1 to discriminate against the plaintiff based upon membership in a protected class.” *Furnace v.*
 2 *Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (citations and quotations omitted). Where such an
 3 equal protection claim does not involve a protected class, a claim may arise under a “class of
 4 one” theory where the plaintiff claims that he has been “intentionally treated differently from
 5 others similarly situated and that there is no rational basis for the difference in treatment.”
 6 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

7 Here, Plaintiff alleges it has been treated differently than “other similarly-situated rock
 8 quarry operators.” (Dkt. Nos. 23–1 at 12–13, 1 at 6.) This is not a protected class. Nor has
 9 Plaintiff provided support for this claim by alleging that Defendants treated Plaintiff differently
 10 than similarly situated individuals. Plaintiff’s Proposed Amended Complaint compares its
 11 treatment to the treatment of a competitor on the “South Fork Rd. project”, however Plaintiff
 12 fails to explain how the competitor is similarly situated to Plaintiff. (Dkt. No. 23–1 at 8.) As an
 13 implicit recognition of the futility of the Proposed Amended Complaint, Plaintiff’s Response
 14 appears to propose additional future amendments to its pleadings where it could make such
 15 allegations. (Dkt. No. 27 at 2.)

16 However, even if the Court granted leave to amend to file a second proposed amended
 17 complaint, amendment would be futile. To avoid turning every government decision into a
 18 constitutional case, the Supreme Court narrowed the availability of the class-of-one claim
 19 in *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591 (2008). In *Engquist*, the Court held that “the
 20 class-of-one theory of equal protection has no application in the public employment context”
 21 because to treat like employees differently does not violate the equal protection clause; rather, it
 22 is an accepted consequence of “the broad discretion that typically characterizes the employer-
 23 employee relationship.” 553 U.S. at 605. The Court held that the employment decision
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1 in *Engquist* was “subjective and individualized, resting on a wide array of factors that are
 2 difficult to articulate and quantify.” *Id.* at 604. By contrast, the prototypical class-of-one case,
 3 exemplified in *Olech*, relies on “the existence of a clear standard against which departures, even
 4 of a single plaintiff, could be readily assessed.” *Id.* at 602.

5 In strikingly similar facts to the present case, the Eleventh Circuit extended the reasoning
 6 in *Engquist* to government contractors, *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274
 7 (11th Cir. 2008), which other courts in this circuit have recognized. *See, e.g., Chandola v.*
 8 *Seattle Hous. Auth.*, 2014 WL 4540024, at *1 (W.D. Wash. Sept. 11, 2014); *Mountain Cascade*
 9 *Inc v. City & Cty. of San Francisco*, 2013 WL 6069010, at *5 (N.D. Cal. Nov. 18, 2013); *Mazzeo*
 10 *v. Gibbons*, 2010 WL 4384207, at *7 (D. Nev. Oct. 28, 2010), *aff’d sub nom. Mazzeo v. Young*,
 11 510 F. App’x 646 (9th Cir. 2013).

12 In *Douglas Asphalt Co.*, the plaintiff, a highway paving contractor, argued the asphalt
 13 mix it utilized to resurface roadways was subjected to “knowingly . . . false and inaccurate
 14 tests . . . and that the tests had never ‘been used for this purpose in the known universe.’” 541
 15 F.3d at 1272. The Eleventh Circuit concluded, “[w]e have little trouble applying the reasoning in
 16 *Engquist*, directed at [] the government-employee relationship, to the circumstances in this case
 17 involving a government-contractor relationship.” *Id.* at 1274. “Just as in the employee context,
 18 and in the absence of a restricting contractor statute, decisions involving government contractors
 19 require broad discretion that may rest ‘on a wide array of factors that are difficult to articulate
 20 and quantify.’” *Id.* (quoting *Engquist*, 553 U.S. at 604). The Eleventh Circuit then held the
 21 plaintiff contractor failed to assert a cognizable right to equal protection. *Id.*

22 The result here is the same. Plaintiff fails to state a cognizable equal protection claim
 23 against Defendants Pacific County and Karen Bannish because of their government-contractor
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1 relationship. Though Plaintiff alleges Defendants failed to follow specific Washington State
 2 Department of Transportation regulatory authority for sampling material (Dkt. No. 23-1 at 4),
 3 Plaintiff fails to explain how even if Defendants followed the alleged regulations Plaintiff would
 4 have been required to be chosen as the supplier for the Project. Again, government entities are
 5 given broad discretion over decisions involving government contractors because those decisions
 6 may rest on “a wide array of factors that are difficult to articulate and quantify.” *Douglas*
 7 *Asphalt*, 541 F.3d at 1274. There are numerous reasons why one government contractor is
 8 chosen over another, and courts are not in a proper position to review such decisions.

9 Therefore, the Court finds that Plaintiff has failed to state a cognizable claim for a
 10 violation of the Equal Protection Clause and its claim is DISMISSED WITH PREJUDICE.

11 **C. The Court Will Not Exercise Supplemental Jurisdiction Over Plaintiff’s Remaining
 12 State Law Claims**

13 Pursuant to 28 U.S.C. § 1337(c), district courts may decline to exercise supplemental
 14 jurisdiction over state law claims if: (1) the claims raise novel or complex issues of state law, (2)
 15 the state claims substantially predominate over the claim which the district court has original
 16 jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction,
 17 or (4) in exceptional circumstances, there are other compelling reasons for declining
 18 jurisdiction. “While discretion to decline to exercise supplemental jurisdiction over state law
 19 claims is triggered by the presence of one of the conditions in § 1337(c), it is informed by the
 20 values of economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114
 21 F.3d 999, 1001 (9th Cir. 1997) (internal citations omitted).

22 Having dismissed Plaintiff’s federal claims, the Court concludes the values of economy,
 23 convenience, and fairness may well be served by this Court’s declining to exercise supplemental
 24 jurisdiction over the remaining claims. *See Acri*, 114 F.3d at 1001. Further, because state courts

1 have a strong interest in enforcing their own laws, *see Carnegie-Mellon University v. Cohill*, 484
 2 U.S. 343, 352 (1988), the value of comity is served by this court declining jurisdiction. *See*
 3 *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“Needless decisions of state
 4 law should be avoided both as a matter of comity and to promote justice between the parties, by
 5 procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are
 6 dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims
 7 should be dismissed as well.”).

8 Therefore, the Court declines to exercise supplemental jurisdiction over Plaintiff’s
 9 remaining state law claims, and these claims are DISMISSED WITHOUT PREJUDICE.

10 **D. Further Leave to Amend Not Warranted**

11 As the Court previously explained, leave to amend shall not be granted if the amendment
 12 would also be subject to dismissal. *Steckman*, 143 F.3d at 1298. Here, the Court reviewed
 13 Plaintiff’s Proposed Amended Complaint in coming to its decision to dismiss Plaintiff’s Due
 14 Process claim. *See infra* Part. III. Furthermore, in its Response, Plaintiff revised its arguments
 15 again, changing its arguments from a property interest to a liberty interest. (Dkt. Nos. 23 at 11-
 16 12, 27 at 1-2.) The Court considered this argument, despite it not being in any pleading, and
 17 came to the same conclusion that Plaintiff failed to state a claim.

18 Similarly, the Court reviewed the additional allegations Plaintiff offered in support of its
 19 equal protection claim. (See Dkt. 27 at 2.) However, because the class of one theory is
 20 inapplicable in the government-contractor relationship, any additional amendment would remain
 21 futile.

1 The Court declines to grant Plaintiff leave to amend again, which essentially would allow
2 Plaintiff a fourth opportunity to plead its claims. Therefore, the Court finds that Plaintiff's due
3 process and equal protection claims are dismissed WITH PREJUDICE.

4 **IV. CONCLUSION**

5 Accordingly, and having considered the briefing of the parties, and the remainder of the
6 record, the Court finds and ORDERS that Plaintiff's Federal Claims are DISMISSED WITH
7 PREJUDICE and Plaintiff's remaining state law claims are DISMISSED WITHOUT
8 PREJUDICE.

9 1. Plaintiff's Cross Motion is DENIED. (Dkt. No. 23)
10 2. This Order resolves the following motions: Dkt. Nos. 7, 21, and 23.
11 3. This case is closed.

12 Dated this 19th day of April 2022.

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15 David G. Estudillo
16 United States District Judge
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